United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL WITH PROOF OF SERVICE

76-7476

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellee,

-against-

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

-and-

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF, as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

Appeal from a Judgment of the United States District Court for the Southern District of New York

REPLY BRIEF OF ADDITIONAL DEFENDANT ON COUNTERCLAIMS-APPELLANT-CROSS-APPELLEE FRED KAYNE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 76-7476

NEWBURGER, LOEB & CO., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant-Gross-Appellee,

-against-

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

and

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D STERN, as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD RUGGENBURG, HARRY B. FRANK and JEROME TARNOFF, as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

REPLY BRIEF ON BEHALF
OF FRED KAYNE

It is hardly "remarkable" that appellants' briefs did

not discuss the subject of breach of fiduciary duty, as claimed on page 46 of the appellees' brief. Rather, appellants could not have believed that on the facts of this case, Gross would have the effrontery to rest his entire case on such a theory. Stripped of the high flown language and Cardozo quotes, Gross' argument comes down to this: He could do whatever he deemed necessary to obtain the immediate return of his capital in spite of the plain language of the partnership agreement, but any action to frustrate him would be a breach of fiduciary duty -- even if those who were supposed to owe him this duty were threatened with total loss. Stated simply, the argument is exposed as a sham. It has neither factual nor legal support.

POINT I

THERE IS NO FACTUAL SUPPORT FOR GROSS' CLAIM OF FIDUCIARY DUTY

Gross' record in the entire affair was one of absolute, unbridled self-interest. He evinced no thought whatever of the interests of the partners who he now claims violated their fiduciary duties towards him. This is shown by merely a chronological recital of the record.

On July 23, 1970, the Exchange censured and fined the Partnership $50,000 for record keeping violations and misstatements in required reports (E 213). By August 1970, the

Partnership had lost $1.3 million for the calendar year (E 1065). On August 13, 1970, Kayne met with officials of the Exchange, who firmly insisted that the Partnership resolve its capital problems (A 3425, 3436).

Gross' response to this state of affairs was to resign from the Partnership on August 31, 1970 (A 3442, E 856-58). Gross knew that his resignation would frustrate the efforts of Risher, Kayne and Muh to revive or reorganize the Partnership. This was obvious for several reasons. First, after his resignation, his capital would be at the risk of the Partnership or its successor for only a limited period. Thus, the pressure to introduce new capital and the difficulty of obtaining it would both be increased. Second, his action was likely to trigger resignations from other partners, further reducing the Partnership's permanent capital. These facts would in turn encourage the Exchange to increase its pressures and insist upon liquidation of the Partnership. Kayne explained this to Gross and tried to persuade him to withdraw his resignation, but Gross refused (A 3442-44).

After Kayne resigned, the efforts to reorganize the Partnership were continued by Risher and others (A 2753-56). The Exchange was increasing its pressure on the Partnership and threatening suspension and liquidation (E 1-2). Gross,

however, made no effort to participate in effecting a solution. He wanted the ship to sink so that he could have the immediate return of his capital. He sought this result in spite of the fact that other members of the Partnership would lose their entire investments.

Gross went further than mere inaction while others sought to save the business. He took positive steps to thwart any reorganization which did not provide for the immediate return of his capital. Since, as he admitted, he had no standing to object (A 2525), he used his influence on Bleich, his former secretary, and Donoghue, his sister, to persuade them to object to the proposed plan (A 2473-74). He then sat back, adamantly refusing any accommodation, while the water poured over the gunwales. As his attorney said, he didn't have to do anything; blood was thicker than water and Donoghue would never consent until Gross was satisfied (E 707). Gross did not even bring an action to restrain the reorganization, although this would have put before the courts his present claims of breaches of fiduciary duties (E 1037). The probable reason he did not do so was that the court would immediately see that as a retired partner whose money was at risk of the business, he had no standing to complain. The court might enjoin the reorganization until Bleich and Donoghue were paid, but this would do nothing for Gross.

For Gross to clothe himself in the precious garb of a cestui que trust under those circumstances is to remove law from any semblance of reality. There was nothing fraudulent or even secret about what either side was doing -- each was attempting to maximize its legal position to encourage the other to make some accommodation. Moreover, with his control of Bleich and Donoghue, Gross held a number of high cards. He could easily have bargained and resisted having paper crammed down his throat, as his brief so colorfully puts it at page 81. But he was not interested in reaching an accommodation. He wanted a liquidation so that he could get his capital immediately. The others -- whom he now accuses of bribery, corruption and theft because they refused to be sacrificial victims -- could sink or swim.

POINT II

THERE IS NO LEGAL SUPPORT FOR GROSS' CLAIM OF FIDUCIARY DUTY

None of the cases upon which Gross principally relies to support his theory, Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928); Duane, Jones Co. v. Burke, 306 N.Y. 172, 117 N.E.2d 237 (1954); Rampell v. Hyster, 3 N.Y.2d 369, 165 N.Y.S. 2d 475 (1957), are even remotely applicable to the situation here. In all three of those cases, the defendants simply sought

by stealth, if not by fraud, to take for themselves the property interests, customers or employees of the plaintiffs. Unlike Gross' conduct here, there was no prior attempt by the plaintiffs to evade any obligations which they had to the defendants or even any apparent prior disagreement between the parties. The court quite rightly condemned such conduct.

But here Gross simply wanted to get out of his obligation to leave his capital in the Partnership or its successor for twelve months after his withdrawal. He attempted to accomplish this by shielding himself behind Bleich and Donoghue and persuading them to disapprove the reorganization. No afterthoughts in his brief to the effect that the successor firm had to be "properly constituted" can minimize his evasion of his obligation. His own actions were directly responsible for any infirmity in the successor firm.

There is nothing in the Meinhard, Burke or Rampell cases that grant the protection of a fiduciary obligation to one who conducts himself in this fashion. To do so would constitute judicial approval of deliberate breaches of contract.

Finally, phrasing his argument in terms of breach of fiduciary duty does not give Gross the right to complain of a violation of §98. That section, as we pointed out in our main brief, was designed solely for the protection of limited partners.

To allow a withdrawn general partner to complain of a violation of §98 merely by framing his claim as a breach of fiduciary duty would not only distort the intent of the statute, but would place an unintended weapon in the hands of a general partner who was trying to avoid his obligations under the partnership agreement.

The fact is that Gross has no standing to complain of a violation of §98 of the Partnership Law and can show no conspiracy to commit a legally cognizable tort. The sole peg on which he attempts to hang such a conspiracy -- breach of fiduciary duty -- falls by reason of Gross' own inequitable conduct toward his fellow partners. See, e.g., Edward Thompson Co. v. American Law Book Co., 122 Fed. 922, 926 (2d Cir. 1903); Weisinger v. Rae, 19 Misc.2d 341, 188 N.Y.S.2d 10, 22 (Sup. Ct. Queens Co. 1959); Fogel v. Bolet, 194 Misc. 1019, 91 N.Y.S.2d 642, 648 (Sup. Ct. N.Y.Co. 1949) and authorities there cited.

CONCLUSION

The judgment against Kayne should be reversed and the claims against him dismissed.

Dated: New York, New York
April 5, 1977

Respectfully submitted,

GOLD, FARRELL & MARKS

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th Rd. MASPETH, NYC.

That on the 5th day of APRIL, 1977, deponent personally served the within REPLY BRIEF OF ADDITIONAL DEFENDANT ON COUNTERCLAIMS-APPELLANT-CROSS-APPELLEE FRED KAYNE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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Robert La Grassa

Sworn to before me this

5th day of APRIL, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979